



Testimony

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CIVIL SERVICE REFORM

Redress System Implications of the Omnibus Civil Service Reform Act of 1996

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Civil Service Reform: Redress System Implications of the Omnibus Civil Service Reform Act of 1996

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the implications of the Omnibus Civil Service Reform Act of 1996 on the redress system for federal employees. When we testified before this Subcommittee in November 1995, we stated that the complexity of the system and the variety of redress mechanisms it affords federal employees make it inefficient, expensive, and time-consuming.¹ Our view remains unchanged. We feel that congressional actions that would reduce this inefficiency, save money, and shorten the time involved in employee redress would be beneficial, provided these actions upheld two fundamental principles: that of fair treatment for federal employees and of an efficiently managed federal government.

Although the legislation was still being drafted as this statement was being prepared, the Subcommittee staff provided us with a narrative outline of the bill. My comments are based on our review of that outline. I will remark briefly on the current redress system, then comment on the following three aspects of the proposed legislation that we feel could have significant implications if enacted:

- eliminating the “mixed case” scenario,
- moving toward the private sector model in handling federal sector discrimination complaints, and
- promoting the use of alternative dispute resolution (ADR) to reduce the number of formal discrimination complaints.

An Inefficient, Expensive, and Time-Consuming System

The purpose of the current redress system, which grew out of the Civil Service Reform Act of 1978 (CSRA) and related legal and regulatory decisions that have occurred over the past 16 years, is to uphold the merit system by ensuring that federal employees are protected against arbitrary agency actions and prohibited personnel practices, such as discrimination or retaliation for whistleblowing. While one of the purposes of CSRA was to streamline the previous redress system, the scheme that has emerged is far from simple. Today, four independent adjudicatory agencies can handle employee complaints or appeals: the Merit Systems Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), the Office of Special Counsel (OSC), and the Federal Labor Relations Authority (FLRA). While these agencies’ boundaries may appear to have been neatly drawn, in practice the redress system forms a tangled scheme.

¹Federal Employee Redress: An Opportunity for Reform (GAO/T-GGD-96-42, Nov. 29, 1995).

To begin with, a given case may be brought before more than one of these agencies—a circumstance that adds time-consuming steps to the redress process and may result in the adjudicatory agencies reviewing each other's decisions. Moreover, each of the adjudicatory agencies has its own procedures and its own body of case law. Each varies from the next in its authority to order corrective actions and enforce its decisions.

Further, the law provides for additional review of the adjudicatory agencies' decisions—or, in the case of discrimination claims, even *de novo*² trials—in the federal courts. Beginning in the employing agency, proceeding through one or more of the adjudicatory bodies, and then carried to its conclusion in court, a single case can take years.

Even the typical case can take a long time to resolve—especially if it involves a claim of discrimination. Among discrimination cases closed during fiscal year 1994 for which there was a hearing before an EEOC administrative judge and an appeal of an agency final decision to the Commission itself, the average time from the filing of the complaint with the employing agency to the Commission's decision on the appeal was over 800 days.³

Just how much the government's multilevel, multiagency redress system costs is impossible to ascertain. We know that in fiscal year 1994—the last year for which data on all four adjudicatory agencies are available—the share of the budgets of the four agencies that was devoted to individual federal employees' appeals and complaints totaled \$54.2 million. We also know that in fiscal year 1994, employing agencies reported spending almost \$34 million investigating discrimination complaints. In addition, over \$7 million was awarded for complainants' legal fees and costs in discrimination cases alone.⁴ But many of the other dollar costs cannot be pinned down, such as the direct costs accrued by employing agencies while participating in the appeals process, arbitration costs, the various costs tied to lost productivity in the workplace, employees' unreimbursed

²In a *de novo* trial, a matter is tried anew as if it had not been heard before.

³EEOC processed requests for hearings before an administrative judge in an average of 154 days. The Commission processed appeals of agency final decisions in an average of 185 days. Cases before MSPB are processed more quickly but still take a long time. In fiscal year 1994, MSPB processed initial appeals in an average of 81 days and processed appeals of initial decisions to the three-member Board in an average of 162 days.

⁴This number includes legal fees and costs (1) paid by agencies in discrimination complaints resolved by administrative procedures and (2) paid from the Judgment Fund for settlements and judgments arising out of lawsuits.

legal fees, and court costs. All these costs either go unreported or are impossible to clearly define and measure.

Moreover, many of the real implications of this system cannot be measured in dollars. The redress system's protracted processes and requirements can also divert federal managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems. It is also important to observe that under this system, federal workers have substantially greater employment protections than do private sector employees. Federal employees file workplace discrimination complaints at roughly 6 times the per capita rate of private sector workers. And while some 47 percent of discrimination complaints in the private sector involve the most serious adverse action—termination—only 18 percent of discrimination complaints among federal workers are related to firings.

Eliminating the “Mixed Case” Scenario

The most frequently cited example of jurisdictional overlap in the redress system is the so-called “mixed case,” under which a career employee who has experienced an adverse action appealable to MSPB, and who feels that the action was based on discrimination, can essentially appeal to both MSPB and EEOC. The employee would first appeal to MSPB, with hearing results further appealable to MSPB's three-member Board. If the appellant is still unsatisfied, he or she can then appeal MSPB's decision to EEOC. If EEOC finds discrimination where MSPB did not, the two agencies try to reach an accommodation. If they cannot do so—an event that has occurred only three times in 16 years—a three-member Special Panel is convened to reach a determination. At this point, the employee who is still unsatisfied with the outcome can file a civil action in U.S. district court, where the case can begin again with a de novo trial.

The proposed legislation would eliminate the mixed case scenario. This would appear to make good sense, especially in light of the record regarding mixed cases. First, few mixed cases coming before MSPB result in a finding of discrimination. In fiscal year 1994, for example, MSPB decided roughly 2,000 mixed case appeals. It found that discrimination had occurred in just eight. Second, when EEOC reviews MSPB's decisions in mixed cases, it almost always agrees with them. Again during 1994, EEOC ruled on appellants' appeals of MSPB's findings of nondiscrimination in 200 cases. EEOC disagreed with MSPB's findings in just three. In each instance, MSPB adopted EEOC's determination.

Under the mixed case scenario, an appellant can—at no additional risk to his or her case—have two agencies review the appeal rather than one. MSPB and EEOC rarely differ in their determinations, but an employee has little to lose in asking both agencies to review the issue. Eliminating the possibility of mixed cases would eliminate both the jurisdictional overlap and the inefficiency that accompanies it.

Moving Toward the Private Sector Model

When a private sector worker complains of discrimination to EEOC, EEOC investigates the complaint and, if it finds that it has merit, will argue the case on behalf of the complainant in U.S. district court. This treatment is less comprehensive than the treatment afforded executive branch federal workers. The fundamental difference is in EEOC's role. First, under EEOC's authority to mandate agency discrimination complaint procedures, the federal employee's agency must investigate the employee's assertion. Second, the complainant is entitled to have EEOC adjudicate the case. A federal employee who is unsatisfied with the outcome is still entitled to seek a trial in U.S. district court.

The proposed legislation, which would bring discrimination complaint processes more in line with the private sector model, would fundamentally change EEOC's role. Today, cases involving both an adverse action appealable to MSPB and a claim of discrimination become "mixed cases" in which MSPB's determination can be opposed by EEOC, and even brought before the Special Panel at EEOC's insistence. Under the proposed legislation, EEOC would not review MSPB decisions. Instead, it would have the authority to petition the Court of Appeals for the Federal Circuit to review MSPB decisions in which EEOC believed that MSPB misinterpreted EEO case law.⁵ EEOC's role, then, would essentially shift from adjudicator to watchdog.

Similarly, in cases involving only a claim of discrimination, EEOC's role would also change. Today, EEOC mandates that agencies perform investigations of their employee's discrimination claims, while EEOC itself adjudicates formal complaints. Under the proposed legislation, EEOC would no longer mandate agencies' discrimination complaint procedures. EEOC would investigate complaints itself, and then determine if the cases had sufficient merit to prosecute before MSPB. EEOC's role, therefore, would change from adjudicator to investigator and prosecutor.

⁵This would be analogous to the current role of the Office of Personnel Management, which may petition the Court of Appeals for the Federal Circuit to review MSPB decisions when it concludes that MSPB has misinterpreted personnel law.

MSPB's role would also change. For the first time, it would adjudicate discrimination complaints that were not necessarily associated with adverse actions.

The redress rights of federal employees would also change dramatically. The most significant changes would involve complainants' access to formal adjudication, both by an adjudicatory agency and in court. Today, no gatekeeper exists to determine which discrimination cases go to an adjudicatory agency. Under the proposed legislation, EEOC would become that gatekeeper, investigating and determining the merits of individual EEOC complaints and deciding whether to argue these cases before the new adjudicator of EEO matters, MSPB. Today, discrimination complainants who remain unsatisfied after exhausting their administrative redress opportunities at EEOC can initiate an entirely new case in U.S. district court. Under the proposed legislation, any administrative redress opportunities would have been exhausted at MSPB, with recourse only to the U.S. Court of Appeals for the Federal Circuit. That would mean a review in court of the administrative process, not a de novo trial on the merits of the case itself.

The proposed legislation would give federal employee discrimination complainants the same opportunity as private-sector employees to take their case to U.S. district court. But it would deny them the right to first pursue formal adjudication within the federal redress apparatus, and then, if still dissatisfied, to start a new case from scratch. The intention of the proposed legislation would be to eliminate what is commonly called the "two bites of the apple."

One significant effect of these proposed changes might be to dampen the number of discrimination complaints reaching the formal adjudicative stage. In earlier testimony, we pointed out that one reason it takes so long to adjudicate discrimination cases is that there are so many of them. From fiscal years 1991 to 1994, for example, the number of discrimination complaints filed increased by 39 percent; the number of requests for a hearing before an EEOC administrative judge increased by about 86 percent; and the number of appeals to EEOC of agency final decisions increased by 42 percent. Meanwhile, the backlog of requests for EEOC hearings increased by 65 percent, and the inventory of appeals to EEOC of agency final decisions tripled.

Dampening the number of complaints—particularly frivolous complaints and those filed by employees who choose to abuse the system—is

certainly a worthwhile goal. However, any major change in the roles of EEOC or MSPB—or in other aspects of the discrimination complaint process—will have broad implications and require careful examination. For example, changes in the adjudicatory responsibilities of EEOC and MSPB would require major organizational change in both agencies. Further, the staffing requirements and skill mix at both agencies would change with their new responsibilities; EEOC, for instance, might need more investigators and fewer administrative judges than it does today. In addition, a basic change in adjudicatory redress procedures would have repercussions in the individual federal agencies, which would likely need to develop new processes to handle discrimination complaints. Moreover, cases already in process would need to be accommodated; a transition period to ensure an orderly changeover from the old system to the new would need to be provided and carefully planned. All these issues would need Congress's close attention if fundamental redress system reform were to be successful.

Promoting the Use of ADR

One way of avoiding formal adjudicative procedures is through the use of alternative dispute resolution (ADR). Many private sector firms have adopted ADR as a means of avoiding the time and expense of employee litigation.⁶ A number of federal agencies have explored ADR as well, and for the similar purpose of avoiding the costly and time-consuming formalities of the employee redress system.

At your request, Mr. Chairman, we have been examining the extent to which federal agencies have been using ADR to settle workplace disputes, as well as the variety of ADR methods they have tried. The particular approaches vary, but include the use of mediation, dispute resolution boards, and ombudsmen.

The use of ADR methods was called for under CSRA and underscored by the Administrative Dispute Resolution Act of 1990, the Civil Rights Act of 1991, and regulatory changes made at EEOC. Based not only on the fact that Congress has endorsed ADR in the past, but also that individual agencies have taken ADR initiatives and that MSPB and EEOC have explored their own initiatives, it is clear that the need for finding effective ADR methods is widely recognized in government.

⁶For a discussion of ADR methods private sector employers use, see our report Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution (GAO/HEHS-95-150, July 1995).

Our preliminary study of government ADR efforts, however, indicates that ADR is not yet widely practiced and that the ADR programs in place are, by and large, in their early stages. Most of these involve mediation, particularly to resolve allegations of discrimination before formal complaints are filed. Because ADR programs generally have not been around very long, the results of these efforts are sketchy; however, some agencies claim that these programs have saved time and reduced costs. One example is the Walter Reed Army Medical Center's Early Dispute Resolution Program, which provides mediation services. From fiscal year 1993 to fiscal year 1995, the number of discrimination complaints at the medical center dropped from 50 to 22—a decrease that Walter Reed officials attribute to the Early Dispute Resolution Program. Moreover, data from the medical center show that, since the program began in October 1994, 63 percent of the cases submitted for mediation have been resolved. Walter Reed officials said that the costs of investigating and adjudicating complaints have been lessened, as well as the amount of productive time lost on the part of complainants and others involved in the cases.

This example is an encouraging one, and at your request, Mr. Chairman, we are continuing to study ADR usage in both private and public sector workplaces, to identify lessons that can be applied more widely in the federal government. Based on work we have done so far in the ADR area, we feel that support for ADR is justified. The strength of ADR, some agencies have told us, is in getting beyond charges and countercharges among the parties involved and getting at the underlying personal interests—many of which may have nothing to do with discrimination—that are often the real cause of conflicts in the workplace. But we would caution that, at this point, ADR is in its preliminary stages of development, that good data on its effectiveness are hard to come by, and that the factors necessary for its success have yet to be fully identified.

Summation

The redress system for federal employees is an area with great promise for change—and not just for improving efficiency, saving money, and improving the timeliness of redress. We feel that effective improvements in the redress system would also improve the fairness and accessibility of the system to employees, and make it easier for managers to manage effectively. Of course, any sweeping change in the redress system would need to be closely examined to ensure that the legitimate rights of federal employees were still protected. Where the balance should be struck is a critical matter for Congress to decide.

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This concludes my prepared statement, Mr. Chairman. I would be pleased to take any questions that you or other Members of the Subcommittee may have.

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